No. 42153-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DONALD KING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Paula Casey, Judge
Cause No. 10-1-01633-7

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. STATEMENT OF THE ISSUE.

1. Whether the trial court's decision to refuse self-defense instructions constituted an abuse of discretion. If it was an abuse of discretion, whether King was prejudiced.

2. Whether the prosecutor committed misconduct, and if so, whether the comments were "so flagrant and ill-intentioned" that a corrective instruction would have been useless.

3. Whether the trial court's finding that King's assault charges were not the "same criminal conduct" constituted an abuse of discretion.

B. STATEMENT OF THE CASE.

Procedural History

Donald Thomas King was charged with (1) two counts of assault in violation of a pretrial no contact order/domestic violence; (2) one count of tampering with a witness/domestic violence; and (3) eleven counts of violation of a pretrial no contact order/domestic violence. [CP 2-6] The State brought an ER 404(b) motion before King's trial, arguing that a prior act of domestic violence between King and Angelina Brockley was admissible. 03/07/11 RP 3. The court agreed, concluding that the prior act of domestic violence was admissible to show a lack of accident or mistake, but inadmissible to show that King had a propensity to commit acts of domestic violence. Id. at 26.

At trial, the judge denied King's request for an instruction on self-defense, 3/22/11 RP 210, and refused to merge the two counts of assault as the same unit of prosecution, Id. at 199. The judge at sentencing also refused to consider the two counts of assault as the same criminal conduct, concluding that they were "two separate instances. . . ." 5/5/11 RP 19-20.[1]

On March 23, 2011, a jury found King guilty of all charges, [CP 7-8] and on May 5, 2011, King was sentenced to 43 months of total confinement, [CP 12] On May 24, 2011, King filed a timely Notice of Appeal.

Statement of Facts

Angelina Brockley had a very tumultuous relationship with her six foot two, 230-pound fiancé, Donald King. 3/21/11 RP 16. When Brockley was living with King off of Martin Way Road, "there were 23 instances of contact between law enforcement and the parties," 3/7/11 RP 4, and in May 2010, King was charged with assaulting Brockley, 3/22/11 RP 53.[2] The charges in this case

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[1] Rejecting King's merger argument, the trial judge explained that "It was the victim's or the witness's early testimony that there was some lapse of time between when she was punched and kicked and then when she was thrown onto the glass table. *It was her early testimony that she thought the argument or fight was over and that it resumed.*" 3/22/11 RP 199 (emphasis added).

[2] A jury acquitted King of his May 2010 assault charge. 3/22/11 RP 75.

stem from a drunken argument the couple had on October 25, 2010. Id. at 56, 58-59.

While Brockley's testimony regarding the couple's October 2010 fight is somewhat inconsistent, she eventually conceded that: (1) King kicked her in the stomach while the two were arguing in their living room, 3/22/11 RP 178; (2) she punched King, Id. at 69; and (3) even though she believed their fight had ended, King pushed her through a glass table in their bedroom, Id. at 164, 182. Because Brockley punched King, Id. 182, he asked the court to issue a self-defense instruction, Id. at 208. Arguing against a self-defense instruction, the State noted that

> The defendant has not alleged – there has been no evidence whatsoever to support the defendant meeting his burden that self-defense was necessary in this case. Even if – even if Ms. Brockley punched the defendant and within moments he pushed her into the table, there's no evidence that his action was anything other than retaliatory. There's no evidence that he had to push her into the table to stop her from injuring him. If anything, his action of pushing her into the table was retaliatory to her hitting him. The evidence is not entirely clear that his push was done immediately following her hitting him.

Id. at 209. The judge agreed with the State's argument, stating that "I am going to find that there is no evidence from which a jury can

conclude that the defendant believed he was about to be injured since he has not testified himself." Id. at 210.

During closing arguments, the State reminded the jury that Brockley's

> initial statement to police, her written statement, her 911 call, *all were that they were arguing and that he threw her through the table.* The recantation or the affidavit that she submitted to the defense attorney, she stated she didn't really remember, she had blacked out, and when she came to he was pushing her.

3/23/11 RP 270 (Emphasis added). The State argued that Brockley changed her mind because she was worried that King would receive another acquittal: "Angelina had to know that there was a chance the defendant would be released from jail. He [*i.e.*, King] instructed her to go and work with his attorney, and that's what she did." Id. at 249; see also id. at 251 (King "gets out of jail, comes right back and moves in with her, having contact with her."). Detective Ronald Weiss, who investigates Thurston County domestic violence cases, testified that it is "very common" for domestic violence victims to alter their stories: "There may be safety issues and fear of repercussions . . . Those are some of the most common ones that I believe affect a victim and encourage them to recant." 3/21/11 RP 36, 37.

C. ARGUMENT.

I. The trial court's decision to deny King's self-defense instruction was proper and did not constitute an abuse of discretion. But even if it did, the trial court's ruling was not prejudicial to King's case.

a. The trial court's denial of King's self-defense instruction did not constitute an abuse of discretion because testimony indicated that King and Brockley's fight had ended when King pushed Brockley. King's push was simply an act of retaliation.

The standard of review afforded to "a trial court's refusal to instruct the jury on self-defense depends on whether the reason for such refusal was based on fact or law." State v. George, 161 Wn. App. 86, 94, 249 P.3d 202 (2011) (citing State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)).

> If the trial court refused to give a self-defense instruction *because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm*, an issue of fact, the standard of review is abuse of discretion. If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is *de novo*.

State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002) (emphasis added) (citing Walker, 136 Wn.2d at 771-72). In this case, the trial judge refused to give King's self-defense instruction because there

was "no evidence from which a jury can conclude that the defendant believed he was about to be injured. . . ." Appellant's Opening Brief at 4 (citing 3/22/11 RP 210). In other words, King's request was denied because "no evidence" supported his "subjective belief of imminent danger of great bodily harm." See Read, 147 Wn.2d at 243. The trial judge's ruling was based on an issue of fact and it cannot be overturned absent an abuse of discretion. See id.

A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or when it is exercised on untenable grounds or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006) (citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that "no reasonable person would take," and arrives at a decision "outside the range of acceptable choices." Id. at 76. A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id.

"To be entitled to a jury instruction on self-defense, the defendant must produce *some evidence* demonstrating self-defense." State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)(emphasis added)(citing State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)). The evidence "is evaluated "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees."" Walden, 131 Wn.2d at 474 (quoting Janes, 121 Wn.2d at 238). The Walden court explained that

> This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

Id. (citing Janes, 121 Wn.2d at 238). Ultimately, "the degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." Walden, 131 Wn.2d at 474 (citing State v. Bailey, 22 Wn. App. 646, 650, 591 P.2d 1212 (1979)). Janes also emphasized that the right of self-defense does not permit action done in retaliation or revenge. Id. at 240 (quoting People v. Dillon, 24 Ill. 2d 122, 125, 180 N.E.2d 503 (1962)).

In State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983), the court held that the trial court should have given a self-defense instruction because the defendant produced "some evidence" demonstrating self-defense. Id. at 489. The McCullum court noted that these factors demonstrated self-defense: the defendant testified that he feared the victim, that he thought that the victim was carrying a gun, and that he had been told that the victim might shoot him. Id. The defendant also testified that before he shot the victim, the victim made a movement toward his jacket—where the defendant said he thought the victim kept his gun. Id. This case involves no such testimony.

In State v. Werner, 170 Wn.2d 333, 241 P.3d 410 (2010), a case that King cites, the court also held that an instruction on self-defense should have been given. Id. at 335. Like this case, Werner involved assault charges. Id. But unlike this case, there was testimony in Werner that indicated "(1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; and (3) the defendant exercised no greater force than was reasonably necessary." Id. at 337 (quoting State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997)).

The Werner court explained: the defendant "stated that he was afraid. That fear was arguably reasonable, given that he was facing seven snarling dogs, including several pit bulls and a Rottweiler." Id. at 337-38. There was also evidence in Werner that the defendant's requests to call the dogs off were refused, Id. at 338, and that the defendant and the dogs' owner were involved in an ongoing property dispute, Id. at 335. In light of this evidence, the court held that a self-defense instruction should have been given because the defendant could have reasonably believed that he was facing imminent danger of death or great bodily harm. Id. at 338.

There is no testimony in this case that indicates King was facing any such danger. See, e.g., id. And no testimony indicates that a "reasonably prudent person" in King's situation would have pushed Brockley through a glass table. See Walden, 131 Wn.2d at 474 (quoting Janes, 121 Wn.2d at 238). Instead, testimony at trial indicated that King is six foot two, 230-pounds, 3/21/11 RP 16; that Brockley punched King, 3/22/11 RP 69; and that after Brockley believed their fight had ended, King pushed Brockley through their glass table, Id. at 164, 182. Despite this testimony, the defendant states

> Brockley testified that she punched Mr. King in the face while sitting on his lap, and that he pushed her away onto a glass table, which broke. RP (3/22/11) 69, 169, 179. She further testified that he was just trying to get her off him when he pushed her away. RP (3/22/11) 181.

Appellant's Opening Brief at 7. But aside from Brockley admitting that King pushed her within "seconds" of when she punched King, 3/22/11 RP 169, the majority of Brockley's testimony indicated that she believed that their fight had ended when King pushed her, Id. at 69:

> Q. Do you recall making the statement "Don did not purposely assault me. I had a blackout, and when I came to, he was only trying to protect himself and me." Do you recall writing that statement in your December 27th affidavit?
>
> A. Yes.
>
> Q. Were you telling the truth earlier today when you testified that he had been calm and that you thought the fight was over when you were pushed through the table?
>
> A. Yeah, but I – I was sitting on him when I punched him.
>
> Q. Angelina, did you believe the fight was over for a period of time –
>
> A. Yeah.

Q. – before the defendant pushed you and you flew through the table?

A. Yeah.

Id. at 181-82.

Considering King's size and Brockley's testimony,[3] the trial judge's ruling was not "manifestly unreasonable" or based "on untenable grounds or for untenable reasons." Dixon, 159 Wn.2d at 75-76 (citing Rohrich, 149 Wn.2d at 654). If anything, the evidence showed that King's actions were retaliatory, 3/22/11 RP 209—which self-defense does not include, Janes, 121 Wn.2d at 240 (quoting Dillon, 24 Ill. 2d at 125). While McCullum and Werner held that self-defense instructions should have been given, testimony in those cases indicated that both the objective and subjective elements of the self-defense standard had been met. McCullum, 98 Wn.2d at 489; Werner, 170 Wn.2d at 335. Because no such testimony exists in this case, King's arguments fail even if Brockley's testimony was viewed in the light most favorable to King.

[3] Argument surrounding King's self-defense motion focused on whether King had produced "some evidence" indicating that he feared for his own safety, but King's self-defense argument also fails because he alleged that he accidentally pushed Brockley through their glass table. RP 3/22/11 91; RP 3/23/11 250. Claims of accident often bar claims of self-defense. See, e.g., State v. Gogolin, 45 Wn. App. 640, 643, 727 P.2d 683 (1986) (defendant who claimed that victim's injuries were accidental not entitled to self-defense instruction); see, e.g., State v. Alferez, 37 Wn. App. 508, 511, 681 P.2d 859 (1984) (self-defense instruction not appropriate because defendant claimed shooting was accidental, among other reasons).

King suggests that "the trial judge applied an erroneous legal standard when she held that self-defense could not be raised absent testimony from the defendant" because "A defendant's testimony is not a necessary prerequisite to a proper claim of self defense." Appellant's Opening Brief at 8. But the trial judge never suggested that King could not claim self-defense because he invoked his constitutional right to not testify; the judge merely found that one reason that King failed to produce evidence demonstrating self-defense was because he did not testify. 3/22/11 RP 210.

b. The trial court's refusal to issue self-defense instructions was not prejudicial to King's case because there was no evidence that indicated King pushed Brockley in self-defense.

A trial court's "refusal to give instructions on a party's theory of the case when there is supporting evidence is reversible error when it prejudices a party." Werner, 170 Wn.2d at 337 (citing Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 266-67, 96 P.3d 386 (2004)).

There is no evidence in this case that King pushed Brockley through their glass table because he was fearful of "imminent danger of death or great bodily harm." Werner, 170 Wn.2d 337. And no testimony indicates that a "reasonably prudent person" in

King's situation would have done what King did. See Walden, 131 Wn.2d at 474 (quoting Janes, 121 Wn.2d at 238). King therefore fails to demonstrate how the trial court's denial of his self-defense instruction was prejudicial to his case. See Werner, 170 Wn.2d at 337. Even if the trial court gave King's requested instruction, it is highly unlikely that the jury would have found that King pushed Brockley in self-defense.

II. The prosecutor did not commit misconduct because the prosecutor's comments (1) were proper; (2) must be viewed in their entire context; and (3) even if they were improper, the comments were not "so flagrant and ill-intentioned" that a corrective instruction would have been useless.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578 (citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the

jury's verdict." Dhaliwal, 150 Wn.2d at 578 (citing Pirtle, 127 Wn.2d at 672).

A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Dhaliwal, 150 Wn.2d at 578 (citing Brown, 132 Wn.2d at 561). The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). The prosecutor—as an advocate—is entitled to make a fair response to the arguments of defense counsel. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994)(citing United States v. Hiett, 581 F.2d 1199, 1204 (5th Cir. 1978)).

Dhaliwal's example of prosecutorial misconduct is illustrative:

> In State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988), the prosecutor made comments that this court held could not have been neutralized by a curative instruction, even if there had been an objection at trial. The prosecutor described members of the American Indian Movement (AIM) as "'a deadly group of madmen,'" "'militant,'" and "'butchers, that

> killed indiscriminately Whites and their own.'" He also asked the jury to remember the AIM's involvement in Wounded Knee and analogized the AIM to the Irish Republican Army's Sinn Fein and Libya's Kadafi. . . .

Dhaliwal, 150 Wn.2d at 578-79. Clearly the prosecutor's comments in this case do not constitute misconduct, as they fall considerably short of the comments made by the prosecutor in Belgrade. Id. at 507-08; see also Bains v. Cambra, 204 F.3d 964, 974 (9th Cir.), cert. denied, 531 U.S. 1037, 148 L. Ed. 2d 536, 121 S. Ct. 627 (2000).

King's case is also distinguishable because the prosecutor's comments were proper, as they "were based on the evidence presented at trial." See Dhaliwal, 150 Wn.2d at 579. King claims that "the prosecutor twice highlighted [his] prior acquittal, argued that the prior allegations had some bearing on Brockley's credibility, and implied that jurors should convict in order to ensure that the legal system didn't fail Brockley a second time." Appellant's Opening Brief at 12 (citing 3/23/11 RP 253, 274). But when the prosecutor's comments are viewed within the context of her entire argument, it is apparent that that is not what the prosecutor alleged.

The prosecutor's comments on 3/23/11 RP 253 sought to explain why Brockley changed her story. King suggested at trial

that Brockley's testimony could not be trusted, see, e.g., 3/22/11 170-72 (Brockley's paranoid schizophrenia made it hard for her to know what really happened); and the prosecutor suggested that it *could* be trusted, see, e.g., 3/23/11 RP 252 (Brockley knew what happened, she was just worried that King would receive another acquittal). Such comments are permissible. See Russell, 125 Wn.2d 24 at 87 (citing Hiett, 581 F.2d at 1204).

The prosecutor also referenced King's May 2010 assault charge to refute King's claim that he did not mean to hurt Brockley: "The defendant was arrested back in May and now they're arguing and she gets thrown through a glass table, but it's an accident and they don't have an abusive relationship." Id. at 250. This statement was also proper, as the judge's 404(b) ruling explicitly stated that Brockley's May 2010 assault charge was admissible to show an absence of accident or mistake. 3/7/11 RP 26.

As to the prosecutor's comments at 3/23/11 RP 274-75, the prosecutor merely refuted King's claim that Brockley "had had a deteriorating relationship with the prosecutor and probably even more with the victim advocate who worked for the prosecutor." Id. at 263. Again, such responsive statements are permissible and do not constitute misconduct. See Russell, 125 Wn.2d 24 at 87 (citing

Hiett, 581 F.2d at 1204). The prosecutor never, as King suggests, asked jurors to ignore the evidence or to take matters into their own hands. Appellant's Opening Brief at 12.

As King acknowledges, the trial court told the jury that it could not base its decision on improper facts: "The court told jurors that their task was to decide the facts, apply the law set forth in instructions, and convict only if convinced beyond a reasonable doubt that Mr. King was guilty. . . ." Id. at 11. Jurors were told not to let their emotions overcome their rational thought processes, and that they could not let themselves be swayed by sympathy, prejudice, or personal preference. Id. at 11-12. The trial court also instructed the jury to only consider prior assault allegations to determine "whether the allegations in Count I and II were accidents or mistakes." Id. at 12.

Each of the prosecutor's comments were proper when they are considered within their context, but when they are considered in light of the instructions King mentioned above, there is no doubt that they were proper. See Dhaliwal, 150 Wn.2d at 578 (the prosecutor's comments must be analyzed in light of the jury's instructions). Despite King's claims, the jury knew that it could only consider King's May 2010 assault charge to determine whether

Count 1 or Count II was an accident or mistake, and that its decision had to be based on evidence presented at trial.

King did not object to the prosecutor's comments at trial, and therefore has to show that the prosecutor's comments were "so flagrant and ill-intentioned" that the resulting prejudice "could not have been neutralized by a curative instruction to the jury." See Dhaliwal, 150 Wn.2d at 578. But because King has not shown that the prosecutor's comments constituted misconduct, he cannot show that they were "so flagrant and ill-intentioned" that a corrective instruction would have been useless. See Id. King's claim that the prosecutor committed misconduct is without merit.

III. The trial court did not abuse its discretion when it found that King's assault charges were not the "same criminal conduct" because King assaulted Brockley at two different times and at two different places.

"Courts look to the factors articulated in RCW 9.94A.400(1)(a)[4] defining "same criminal conduct" to determine whether crimes are "separate and distinct" under RCW 9.94A.400(1)(b)." State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000) (citing State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365

[4] In 2001, RCW 9.94A.400 was re-codified as RCW 9.94A.589. See RCW 9.94A.589.

(1999)). If two crimes do not constitute the "same criminal conduct," they are necessarily "separate and distinct." Price, 103 Wn. App. at 855 (citing State v. Brown, 100 Wn. App. 104, 113, 995 P.2d 1278 (2000)). "A court will consider two or more crimes the "same criminal conduct" if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim." Price, 103 Wn. App. at 855.

If one of these prongs is absent, then "same criminal conduct" cannot be found. Id. (citing State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994)). "An appellate court will reverse a sentencing court's determination of "same criminal conduct" under RCW 9.94A.400(1)(a) only if it finds a clear abuse of discretion or misapplication of the law." Price, 103 Wn. App. at 855 (citing State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000)). Courts "must narrowly construe RCW 9.94A-.400(1)(a) to disallow most assertions of same criminal conduct." Price, 103 Wn. App. at 855 (citing State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999)).

In Price, the defendant appealed his convictions of attempted first degree murder, claiming that they were improper because they constituted the same criminal conduct. Id. at 848.

The State conceded that the "same victim" requirement was met, but argued (1) that the defendant did not commit the crimes at the same time and place; and (2) that both shootings did not involve the same criminal intent. Id. at 855. The same is true in this case: the "same victim" prong is met, but the "same time and place" and the "same criminal intent" prongs are missing.

Regarding the "same time and place" prong, Price acknowledged that offenses occur at "the same time and place" even if they did not occur simultaneously: in State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997), "the Supreme Court held that the 'same time' and 'same intent' elements of the same criminal conduct test were satisfied because the drug deliveries were part of a continuing, uninterrupted sequence of conduct." Price, 103 Wn. App. at 856 (citing Porter, 133 Wn.2d at 186). But Price rejected the defendant's argument that his shootings constituted a "continuing, uninterrupted sequence of conduct,"

> Price fired his first shot after he parked the Silverado, exited the truck, and approached where Nakano and Hooper had parked. Then, Price returned to the stolen truck, pursued Nakano and Hooper onto the on-ramp, pulled alongside their vehicle on the interstate, and fired the two additional shots. Price had time to run back to his vehicle, follow the victims onto I-5, pull beside the victims, direct his passengers to get down, and then fire. *Therefore, we disagree*

> *with the trial court that the two incidents took place within a sufficiently proximate time to meet this part of the same criminal conduct test.*
>
> Second, the trial court concluded that the two shootings took place at two sufficiently distinct, separate locations to make Price's criminal conduct separate and distinct. *Here, the trial court was correct. Price first fired into Nakano's vehicle while stopped on the Deschutes Parkway, within the Tumwater city limits (Counts I and II). The second shooting took place when both cars were traveling on the interstate, within the Olympia City limits (Counts III and IV).*

Id. at 856 (emphasis added). The same is true in this case: King and Brockley's fight began in their living room, 3/22/11 RP 178, and had already ended when King pushed Brockley through their glass table, id. at 164, 182. King assaulted Brockley at two different times and at two different places.

As for the "intent" prong, Price held that it also changed between the two shooting incidents: "Price made the choice to return to the stolen Silverado, start the truck, and pursue the victims onto the interstate. This allowed time for Price to form new criminal intent." Id. at 858. Like the defendant in Price, King made two separate, distinct choices: (1) to kick Brockley in her stomach while the two argued in their living room, 3/22/11 RP 178, and (2) to push Brockley through a glass table in their bedroom, Id. at 164, 182.

King had time to decide either to cease his criminal conduct or to commit a further criminal act. He chose the latter, forming a new criminal intent.

As King admits, "A sentencing court's "same criminal conduct" determination will [only] be reversed based on a clear abuse of discretion or misapplication of the law." Appellant's Opening Brief at 13 (citing State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000)). Given Brockley's testimony that there were two separate assaults, 3/22/11 RP 164, 178, 182, King has failed to show that the trial court's ruling was "manifestly unreasonable," "exercised on untenable grounds," or "for untenable reasons," see Dixon, 159 at 75 (citing Rohrich, 149 Wn.2d at 654).

D. CONCLUSION.

King failed to show that the trial court's refusal to issue a self-defense instruction constituted an abuse of discretion; that the prosecutor committed misconduct; or that the trial court abused its discretion when it found that King's assault charges were not the

same criminal conduct. The State respectfully asks this court to affirm King's convictions.

Respectfully submitted this 1st day of February, 2012.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Response to Personal Restraint Petition, on the date below as follows:

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JODI R. BACKLUND, ATTORNEY FOR APPELLANT
EMAIL: BACKLUNDMISTRY@GMAIL.COM

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 1st day of February, 2012, at Olympia, Washington.

Chong McAfee

THURSTON COUNTY PROSECUTOR

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